In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 796

THE DREDGE CORPORATION, PETITIONER

v.

J. RUSSELL PENNY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL OFFICERS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5–13) is reported at 398 F. 2d 791. Its opinion in an earlier phase of the case is reported at 338 F. 2d 456.

JURISDICTION

The judgments of the court of appeals were entered June 26, 1968. A timely petition for rehearing was denied on September 30, 1968. The petition for a writ of certiorari was filed on December 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

30 U.S.C. 22 provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the

> United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

QUESTION PRESENTED

Whether the Department of the Interior applied proper standards in determining whether discoveries of "valuable mineral deposits" had been made under the mining laws.

STATEMENT

In July 1952, petitioner located the 36 mining claims for sand and gravel involved here on land situated near Las Vegas, Nevada. In 1955 and 1957, administrative proceedings contesting the validity of these locations were initiated. These culminated in decisions that the locations were invalid, because there had been no discovery of "valuable mineral deposits." In reaching this conclusion, two established interpretations of this statutory phrase were relied upon. It was found that the deposit would not justify a prudent man in further expenditure of his time and money in an effort to develop a paying mine; and, in view of the common nature of the minerals involved, it was also found that the mineral could not presently be extracted, removed and marketed at a profit.

Petitioners filed actions in the United States District Court for Nevada against local officers of the Department of the Interior, seeking to reverse the administrative decisions. The district court granted summary judgment for the defendants; the court of appeals vacated those judgments because of procedural error; on the authority of an intervening court of appeals decision disapproving the present "marketability" standard, *Coleman* v. *United States,* 363 F. 2d 190 (C.A. 9), affirmed on rehearing, 379 F. 2d 555, the trial court then reversed the decision of the Secretary of the Interior as to all claims. When the cases again came before the court of appeals, its *Coleman* decision had been reversed by this Court. *United States* v. *Coleman,* 390 U.S. 599. Recognizing that the basis for the trial court's reversal of the departmental decisions had been eliminated, the court of appeals examined the record, concluded that the administrative findings were supported by substantial evidence and reversed with directions to enter judgments for the defendants.

ARGUMENT

1. Petitioners' contention that use of the "present marketability" test in connection with the "prudent man" standard is invalid because the former test was never published in the Federal Register (Pet. 4–6) is an attempt to relitigate the issues settled last Term in *Coleman.* As was shown in the *Coleman* argument, the "present marketability" test has been applied for nearly four decades (see the Petition in No. 630, O.T. 1967, p. 7 and Petitioner's Brief, *id.,* at pp. 14–15).

The court of appeals correctly recognized as this Court's holding in *Coleman* that "the so-called 'present marketability' test is a logical complement to the 'prudent man' test and an appropriate way to identify, with greater precision and objectivity, the factors relevant to a determination that a mineral deposit is 'valuable.' " That is, the test is a permissible administrative interpretation and application of the statutory requirement of "valuable mineral deposits" and hence is not required to be stated in the Federal Register by the Administrative Procedure Act, 5 U.S.C. 552.

2. In attacking the "present marketability" standard as unconstitutionally "vague, indefinite and uncertain" (Pet. 6), petitioner proves too much; his analysis seems equally applicable to the even more general term "valuable mineral deposits" used in the statute. But dollars and cents precision is not required. In the exercise of its plenary authority over the public domain, Congress has delegated broad authority to the Secretary of the Interior to implement its policy as to disposal of such lands. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334; *Boesche* v. *Udall*, 373 U.S. 472. The standards he has adopted are consistent with the congressional scheme and sufficiently precise to inform administrative judgment and enable meaningful judicial review. No more is or could be required.

3. There is nothing in proceedings below to indicate that the Common Varieties Act of 1955, as amended, 69 Stat. 368, 30 U.S.C. 611, was applied retroactively in this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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